In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1733

HAROLD G. NABHAN, FREDERICK N. NABHAN, MABEL T. NABHAN, AMOS NABHAN AND VIOLET ANN NABHAN,
PETITIONERS,

v.

FREDERICK ABDULLA AND JULIA C. ABDULLA,
RESPONDENTS.

Petition for Writ of Certiorari to the Appeals Court of the Commonwealth of Massachusetts.

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Table of Contents.

Table of Authorities Cited.

Cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

PROCEDURAL RULES.

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Citations to Opinions Below.

The opinion of the Appeals Court is reported at 1977 Mass. App. Ct. Adv. Sh. 119, 359 N.E. 2d 650 (1977). The decision of the Supreme Judicial Court denying further appellate review is found at 1977 Mass. Adv. Sh. 621.

Jurisdiction.

The judgment of the Appeals Court of the Commonwealth of Massachusetts was entered on February 4, 1977. On February 24, 1977, pursuant to Mass. G.L. c. 211A, § 11, defendants filed an application for further appellate review in the Supreme Judicial Court of Massachusetts. On March 29, 1977, this application was denied.

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(3).

Question Presented.

Was the Superior Court of the Commonwealth of Massachusetts required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to grant petitioners' request for a continuance of trial?

Statutory Provisions.

Section 1 of the Fourteenth Amendment of the Constitution of the United States is found at page xlvii of Volume I of the United States Code (1958 ed.).

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 11 of Mass. G.L. c. 211A is found at pages 665-666 of the 1972 Acts and Resolves of the Commonwealth of Massachusetts and states:

> "There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by that court, except: — (*a*) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (*b*) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice. Upon the written order of a majority of the justices of the appeals court, the decision of a panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court. Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court."

Statement of the Case.

On May 19, 1972, respondents filed in the Superior Court of the Commonwealth of Massachusetts a bill of complaint

seeking to determine the right of petitioners to maintain appurtenant to a building owned by petitioners a structure in the nature of a canopy overhanging land owned by respondents. Under the rules of pleadings then in force in the Commonwealth of Massachusetts, petitioners filed a demurrer and plea in abatement. Neither respondents, as plaintiffs in the Superior Court, nor petitioners, as defendants, took any steps to have the dilatory pleadings heard and disposed of or the case heard on the merits. A preliminary injunction requested by respondents was denied.

On March 5, 1975, the Superior Court on its own motion referred the case to a Master for hearing. On June 6, 1975, respondents filed a motion to revoke the order of reference, and this was allowed. On June 24, 1975, the Clerk of the Superior Court informed petitioner Harold Nabhan, who is an attorney and a member of the Bar of the Commonwealth of Pennsylvania, that on June 25, 1975, this case would be heard in the Superior Court only on plea and demurrer and that trial would be held in September, 1975. The same statement was communicated to petitioners' attorney of record.

On June 25, 1975, petitioner Harold Nabhan appeared in court with his attorney, prepared to argue the demurrer and the plea. At this point the Judge ordered immediate trial. Both Mr. Nabhan and his attorney protested that the only notice they had received was of hearing on the plea and the demurrer, that they had no witnesses, and that they were otherwise totally unprepared to go forward with trial. Additionally, they informed the Judge that Mr. Nabhan was seeking to retain new counsel more experienced in the litigation of real property cases. They requested a continuance. The Judge, recognizing that their assertions were true, nevertheless ordered trial to begin immediately. Petitioners proceeded "under protest."

The Judge indicated that at the close of respondents' case he would give petitioners some time for preparation. In fact, no time was given for petitioners to prepare; respondents put in their entire case on June 25th, and the next morning on June 26th at 10 a.m. the Judge insisted that petitioners begin offering evidence, even though the motion for continuance was renewed at that time. On the afternoon of the 26th both sides rested.

On July 22, 1975, the Superior Court entered findings, rulings and order for judgment. The findings and rulings were adverse to petitioners. A judgment in accordance therewith was entered on August 21, 1975. Pursuant to Rule 59 of the Massachusetts Rules of Civil Procedure, petitioners on August 21, 1975, filed a motion for new trial, specifically pointing out in affidavit that they may have inadvertently failed to cross-examine respondents' main witness, respondent Frederick Abdulla, on a critical issue. The motion was denied on October 23, 1975.

Petitioners appealed to the Appeals Court of the Commonwealth of Massachusetts. In their brief to the Appeals Court, they argued (*inter alia*) that it was error for the trial judge to have refused a continuance under Massachusetts law and that "denial of a continuance deprived defendants of their right under the Fourteenth Amendment to the Constitution of the United States to have adequate notice of a hearing." They cited and quoted from cases decided by this Court to support their position. On February 4, 1977, the Appeals Court entered judgment affirming the Superior Court. It disposed of petitioners' request for continuance in a single sentence (359 N.E. 2d at 651): "The judge did not abuse his discretion in denying the continuance."

Petitioners filed a timely application for further appellate review in the Supreme Judicial Court (Rule 27.1 of the Massachusetts Rules of Appellate Procedure, as amended,

p. A.P. 41 of the Rules of the Courts of the Commonwealth (Mass.)), again alleging with citation of authority that the denial of a continuance was erroneous and arguing:

> "The refusal to grant a continuance when it operates to force a person to trial who is not reasonably prepared for trial is a denial of Due Process of Law, guaranteed under the Fourteenth Amendment to the Constitution of the United States."

The Supreme Judicial Court on March 29, 1977, denied further appellate review.

In civil appellate cases Massachusetts has no form corresponding to an assignment of errors wherein constitutional or other issues are raised. Where a party asks the trial court to take certain action without specifying the basis for his request and the request is denied, the party is permitted on appeal to urge any and all grounds in support of the action requested to be taken including federal constitutional grounds. *Vermilye* v. *Western Union Telegraph Co.*, 207 Mass. 401, 405-406, 93 N.E. 635, 636-637 (1911). By rule of court, Massachusetts does require that all appellate arguments be raised in the brief of the party advancing them. Rule 1:13 of the Rules of the Appeals Court. 1 Mass. App. Ct. 882, 889. As already noted, petitioners' brief did argue that the denial of a continuance was a violation of petitioners' rights under the Due Process Clause of the Fourteenth Amendment.

Tempting though it may be, we shall not at this point examine the other issues of fact and law raised in this case. Some further discussion will be necessary in the part of the brief under the heading "Reasons for Granting the Writ." The sole point, however, of this petition is that in the

circumstances it was constitutional error to compel petitioners to trial on literally a moment's notice.

Reasons for Granting the Writ.

The Failure to Give Petitioners Any Advance Notice of the Date of a Trial at which Complex Issues of Law and Fact were to be Presented Deprived them of Due Process of Law in Violation of the Fourteenth Amendment.

Can a litigant be ordered to trial on literally a moment's notice? May a party rely on notice given in June by the clerk of court that trial would not occur until September? These are the two components of the question presented (p. 2, *supra*): "Was the Superior Court of the Commonwealth of Massachusetts required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to grant petitioners' request for a continuance of trial?"

We do not doubt that under both Massachusetts law and federal constitutional law the question whether to grant a continuance is addressed to the sound discretion of the court. As this Court held in *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964), reh. den. 377 U.S. 925 (1964): "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process . . .." But judicial discretion means something more than the tossing of a coin; it must be exercised with due regard to the rights of the parties before the court. *Crosby* v. *Martinez*, 159 Cal. App. 2d 534, 541-542, 324 P. 2d 26, 31 (1958). Nor is it

enough to say, as the trial court did in the instant case, that the dockets are crowded and there would be no sitting in July (to which petitioners requested a continuance when all other requests were rejected). As the *Ungar* Court also noted, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can" effectively violate all other constitutional rights.

It is a matter of settled law that Due Process, in a civil no less than a criminal case, involves notice and the opportunity for hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208, 212 (1962). But to satisfy the Due Process Clause of the Fourteenth Amendment, a hearing must be more than "empty formality" (*Ungar, supra*); there is no hearing in the constitutional sense where "the party . . . is not given an opportunity to test, explain, or refute." *Interstate Commerce Comn.* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93 (1913). With less than five minutes' time to prepare, no attorney is ready to "test, explain, or refute." For this reason, however much notice a party may be entitled to before hearing (see, *e.g.*, *Elliano* v. *Assurance Company of America*, 45 Cal. App. 3d 170, 175, 119 Cal. Rptr. 653 [1975]), five minutes or less is never constitutionally sufficient. But even if this proposition is not universally true, it is at least true "in the circumstances present in" this case (*Ungar, supra*), whose facts we shall now briefly discuss.

In 1954, respondents purchased a rectangular strip of land in Salisbury, Massachusetts, a New England shore community popular for vacations and recreational activities. The opinion of the Appeals Court refers to this strip as "the locus." The locus was registered under the Massachusetts version of the Torrens Act (Mass. G.L. c. 185, §§ 26 *et seq.*) and was subject to perpetual use as a pedestrian

thoroughfare. In short, the locus is a private way subject to a public use. In 1962, petitioners bought a commercial building adjoining the locus on the east and touching the line of the locus. Appended to this building, which had been built in the early 1940's and was for a long time in common ownership with the locus, was a canopy-like structure overhanging the locus. The canopy has been used by businesses located in petitioners' building to advertise and also has given shelter to pedestrians at times of inclement weather. In 1971 petitioners' building was destroyed by fire and subsequently was rebuilt as before with the canopy overhanging the locus.

As already noted, in the present action respondents sought injunctive relief to restrain petitioners from maintaining their canopy over the locus. Under Massachusetts law, respondents, although plaintiffs in the Superior Court, had an exceptionally easy case to try; their burden was satisfied upon a showing that they owned the locus and that petitioners' canopy overhung it. Upon such showing respondents became entitled to a mandatory injunction[1] unless petitioners could satisfy their burden of showing some cause for not granting an injunction. Petitioners believed that with due time they could have established several defenses arising out of the following circumstances: (a) the easement enjoyed by the public to use the locus as a thoroughfare, (b) the fact that the supposedly trespassing structure does not touch the thoroughfare but only overhangs it, actually affording shelter in inclement weather to members of the general public using the locus as a thoroughfare, (c) the tax-free and virtually, from the

[1] *Goldstein* v. *Beal*, 317 Mass. 750, 757-758, 59 N.E. 2d 712, 716-717 (1945); *Peters* v. *Archambault*, 361 Mass. 91, 92-94, 278 N.E. 2d 729, 730-731 (1972).

owner's viewpoint, maintenance-free status of the locus, (d) the admitted absence of any harm to respondents resulting from the existence of the overhang, (e) a delay of eighteen years between respondents' acquiring title to the locus and their bringing of this action, and (f) respondents' inequitable conduct in extending a building owned by them onto a thoroughfare adjacent to the locus.

These defenses may be characterized as laches and a general showing that injunctive relief would be inappropriate because it would not operate equitably and because the injury to respondents was trivial. The burden with respect to each of these defenses was, under Massachusetts law, on petitioners as defendants in the Superior Court. *Three Sons, Inc.* v. *Phoenix Ins. Co.*, 357 Mass. 271, 278, 257 N.E. 2d 774, 778 (1970); *Geragosian* v. *Union Realty Co.*, 289 Mass. 104, 109-110, 193 N.E. 726, 728 (1935).

If a moment's preparation time is inadequate generally, it is surely inadequate for a party who must carry this kind of burden. Is it also unconstitutional? Although we have found no case specifically holding that Due Process entitles a party in a civil action to reasonable notice in advance of trial, it is a proposition easily deduced from numerous cases decided by this and other American courts. See *United States ex rel. Turner* v. *Fisher*, 222 U.S. 204, 208 (1911); *Seaboard Air Line Ry.* v. *Koennecke*, 239 U.S. 352, 354 (1915) (no denial of Due Process where at trial plaintiff was allowed to amend but defendant's counsel disclaimed resulting surprise; indication that unforeseeable surprise would have entitled defendant to continuance); *Ungar* v. *Sarafite*, *supra* (implication from statement that not every denial of a request for more time violates Due Process is that some denials may; *Department of Highways* v. *Parker*, 306 Ky. 14, 15, 206 S.W. 2d 73, 74 (1947) (forcing state attorney general to trial in two-year-old case with one day's

notice held "a gross abuse of judicial discretion"); *Giuseppi* v. *Cozzani*, 248 Miss. 588, 594, 159 So. 2d 278, 281 (1964); *Elliott* v. *Lawson*, 87 Or. 450, 453-454, 170 Pac. 925, 926-927 (1918); *Cohen* v. *Herbert*, 186 Cal. App. 2d 488, 490-496, 8 Cal. Rptr. 922, 923-927 (1960).

Moreover, if it were not enough that petitioners were given no notice that trial would be held on June 25, 1975, they were actually given notice that trial would not be held that day, that it would not be held until September. It is the duty of clerks of court in Massachusetts, as it undoubtedly is elsewhere, to notify parties of the date of trial, and Massachusetts attorneys, again like attorneys elsewhere, rely on such notice. See *Mahoney* v. *Bernstein*, 353 Mass. 649, 653, 234 N.E. 2d 278, 280 (1968). Such reliance gives rise to a constitutional right that may not later be defeated. See *Johnson* v. *United States*, 318 U.S. 189, 196-197 (1943); *Raley* v. *Ohio*, 360 U.S. 423, 437-438 (1959); *Cox* v. *Louisiana*, 379 U.S. 559, 571-573 (1965). Having been told by the clerk that they need not be prepared for trial on June 25, 1975, they had, we submit, a right not to be prepared on that date. When the trial judge ordered them to trial without further time for preparation, he acted in derogation of that right and violated petitioners' rights under the Due Process Clause of the Fourteenth Amendment.

We briefly address the subject of prejudice. In *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915), this Court held that prejudice would be presumed where a party was deprived of his right to an appropriate hearing and that it would be no objection that, had the hearing been held, the party would have lost anyway. Although that rule was and is sound, we think it appropriate to point out that, with respect to the defense of laches, the Appeals Court specifically rested its opinion on the failure of the

petitioners to show prejudice stemming from respondents' delay in bringing their action. Petitioners believe that in a retrial they could show such prejudice stemming both from the purchase of the building in 1962 and from several negotiations and renegotiations of leases in which the tenants relied upon the use of a canopy for advertising and other purposes. Indeed, even a cursory perusal of the transcript of the trial in this case will amply demonstrate the validity of petitioners' position that more than a few minutes' notice should be given before a party is compelled to go to trial.

Although cases in which parties are ordered to trial with as little time as present petitioners were afforded are undoubtedly few and far between — were they frequent the condition of the American judicial system would be lamentable — this is nevertheless a case within the purview of Rule 19 where "a state court has decided a federal question of substance not theretofore determined by this [C]ourt" and in a way "probably not in accord with applicable decisions of this [C]ourt." The time, we submit, has come to determine just how little notice a party in a civil action is entitled to have under the Due Process Clause before he can be ordered to trial.

Conclusion.

For the reasons given, a writ of certiorari should issue to review and reverse the judgment of the Appeals Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Appendix.

APPEALS COURT.

No. 76-39.

FREDERICK ABDULLA & another *vs.*
HAROLD G. NABHAN & others.

February 4, 1977.

1. Assuming, as the defendants contend we should, that the building which was built in the early 1940's, acquired by the defendants in 1962, and destroyed by fire in 1971 overhung the locus by approximately five feet and that the plaintiffs knew of that fact when they purchased the locus in 1954, it does not follow that the defendants were entitled as of right to rebuild the overhang after the fire. As the locus was registered land, no easement to maintain the overhang could have arisen by implication or prescription. *Dubinsky* v. *Cama*, 261 Mass. 47, 58 (1927). *Goldstein* v. *Beal*, 317 Mass. 750, 757, 758-759 (1945). See also *Peters* v. *Archambault*, 361 Mass. 91, 93-94 (1972). The cases relied upon by the defendants, *Killam* v. *March*, 316 Mass. 646 (1944), and *Butler* v. *Haley Greystone Corp.* 347 Mass. 478 (1964), are limited in their application to a prior conveyance of an interest in registered property which, although not appearing in the decree of registration or the certificate of title, has come to the actual notice of a later grantee of the registered property at the time of the conveyance to him. We need not reach the question whether, if there had been an easement before the destruction of the prior building in 1971, it was thereby terminated. See *Cotting* v. *Boston*, 201 Mass. 97, 101-102 (1909). 2. Ab-

sent laches (no prejudice to the defendants having been shown) or estoppel (clearly inapplicable in view of the judge's finding that the plaintiffs notified the defendants prior to the construction of the present building that they did not want the overhang to extend over the locus), the overhang was properly ordered removed. *Goldstein* v. *Beal, supra,* at 757-758. *Peters* v. *Archambault, supra,* at 92-94. 3. The judge did not abuse his discretion in denying the continuance.

Judgment affirmed.

David Berman for the defendants.

Joseph A. Miragliotta, for the plaintiffs, submitted a brief.

SUPREME JUDICIAL COURT

Orders.

The Supreme Judicial Court has made the following orders with respect to application for leave to obtain further appellate review:

March 29, 1977

. . . . . .

Denied:

No. M-658. FREDERICK ABDULLA & another *vs.* HAROLD G. NABHAN & others. Reported below: Mass. App. Ct. Adv. Sh. (1977) 119.
